Supreme Court, U.S.

No. 92-1430

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ERNEST DAVIDSON, DARLENE DAVIDSON,
Individually and as Guardians ad Litem of
SHERENE DAVIDSON AND ERNEST DAVIDSON, JR.,
their minor children,
Petitioners,

v.

VELSICOL CHEMICAL CORPORATION, an
Illinois Corporation,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Nevada

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Velsicol concedes that the Nevada Supreme Court found that FIFRA *does not* expressly preempt plaintiffs' labeling claims and that, under *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), it should have limited its analysis to that issue. *See* Brief in Opposition (Opp.) at 8 n.5, 14 n.11. Nevertheless, Velsicol offers four reasons why this Court should deny *certiorari*. All of those reasons are lacking in merit.

1. This Court's Jurisdiction Is Entirely Proper.

First, Velsicol contends that this Court lacks jurisdiction to grant *certiorari*. Opp. at 9. In *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 479 (1975), however, this Court held that jurisdiction is entirely proper in a case where "the federal issue is conclusive or the outcome is preordained." This is just such a case, as Velsicol acknowledged below.

The Davidsons' amended complaint seeks relief under Nevada state common law claims of negligence and strict liability. Both claims are based on allegations of failure to warn. Petition for A Writ of Certiorari (Pet.) at 4. After the trial court ruled that FIFRA impliedly preempts state common law tort actions based on an inadequate labeling theory, Velsicol opposed rehearing, but did not oppose the Davidsons' motion to certify for interlocutory appeal. Instead, contrary to its current contention that additional claims "remain to be determined by the State court", Opp. at 9, Velsicol itself asserted that the FIFRA preemption ruling is "probably dispositive of -- the presentation of plaintiffs'

case." Opposition to Motion for Rehearing and Reconsideration at 4.

The trial court was of the same view. Granting the motion to certify, it said the appeal involved a "fundamental legal issue underlying Plaintiff's product liability and negligence claims against Defendant Velsicol". Pet. App. at 30a.

In *Cox, supra* at 478-79, this Court recognized that, to avoid the "mischief of economic waste and of delayed justice", jurisdiction may be taken in those cases where the litigation is "for all practical purposes concluded". This principle applies even where there are "entire trials yet to occur in the state courts" if, because of the way the federal question was resolved, the "proceedings [will] have little substance". *Id.* In this case, there is simply no useful purpose to be served by requiring the Davidsons to go back to the trial court and then return to this Court with the exact same issue -- an issue that even Velsicol concedes the Nevada Supreme Court erred in analyzing. This Court's jurisdiction, therefore, is entirely proper.

2. The Conflict is Real and Growing.

Velsicol's second contention is that, despite the extensive conflict among the lower courts over FIFRA's preemptive effect, "there is no split of authority which requires this Court's resolution." Opp. at 13. Velsicol dismisses the findings of no express preemption in both *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1539 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), and *Ciba-Geigy Corp. v. Alter* (*Alter*), 834 S.W.2d 136 (Ark.1992), solely because they were issued before *Cipollone*. It further claims

that trial court decisions are insignificant and, incredibly, asserts that "since *Cipollone*, there has been complete uniformity, at least of result." Opp. at 12.

In fact, what the pre-and-post-*Cipollone* trial and appellate decisions prove (including the decision in this case) is that *Cipollone* did *not* resolve the conflict among the lower courts. Indeed, in several instances since *Cipollone*, courts have expressly disagreed with the result reached in other cases. *See, e.g., Levesque v. Miles, Inc.*, 1993 US.Dist. LEXIS 3395, * 25 (D.N.H. Mar. 18, 1993) (disagreeing with *Papas v. The Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (*Papas II*)); *MacDonald v. Monsanto Co.*, 1993 WL 49898 (E.D.Tex. Feb. 25, 1993)(disagreeing with *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993) (*Arkansas-Platte II*)); *Gibson v. Dow Chemical Co.*, CV 92-30 (E.D. Ky. Oct. 19, 1992), slip. op. at 5 (disagreeing with *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992), *vacated and remanded,* 113 S. Ct. 314 (1992), *re-aff'd, Arkansas-Platte II*)[1].

As two recent decisions, *Papas II* and *MacDonald*, plainly demonstrate, the conflict is real and growing. The former involved a man who contracted benzene-induced anemia after being exposed to a pesticide manufactured by the defendant. *Papas II at 517.* Although the pesticide contained benzene, its label did not mention that fact. *Id. at 518.* Seeking damages under Florida common law, the man and his family sued the manufacturer for, among other things, failure to warn. *Id.* In addition, they alleged that, in

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[1] We understand that the plaintiffs in both *Papas II* and *Arkansas-Platte II* will be seeking review again by this Court in the near future.

seeking approval for the pesticide's label from the Environmental Protection Agency (EPA), the manufacturer failed to disclose that the pesticide contained benzene. *Id.*

Reconsidering the case on remand from this Court in light of *Cipollone*, the Eleventh Circuit held that FIFRA expressly preempts all claims based on failure to warn theories. *Id.* at 520. This holding directly conflicts with both *Ferebee* and *Alter*, as well as with the decision of the Nevada Supreme Court below.

The Eleventh Circuit also specifically rejected the plaintiffs' contention that the defendant could be held liable because of its misrepresentations to the EPA. It ruled that FIFRA "leaves states with no authority to police manufacturers' compliance with federal procedures". *Papas II* at 519. This ruling directly conflicts with the Fourth Circuit's holding in *Worm v. American Cyanamid*, 970 F.2d 1301, 1308 (4th Cir. 1992), *on remand*, No. HAR 90-1424, 1992 WL 368062 (D.Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 29, 1992), that state actions which seek compensation for violations of federal law are not preempted by FIFRA.

Finally, the Eleventh Circuit ruled that the plaintiffs' claims for failure to warn in literature or postings beyond the label (such as point-of-sale signs or consumer fact sheets) are expressly preempted by FIFRA. *Papas II* at 519. This ruling directly conflicts with rulings of the Second and Ninth Circuits that § 136 v(b) of FIFRA, which refers to "labeling", does not preempt state law in regard to off-label information about the product, including point-of-sale signs and consumer notices. *Chem. Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941 (9th Cir.), *cert. denied*, 113 S.Ct. 80

(1992); *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989). *See also*, *Levesque v. Miles, Inc.*, *supra* (explicitly disagreeing with *Papas II* and holding that, if warnings apart from labels or packaging should have been used, the defendant can be held liable).

In *MacDonald*, the plaintiff was diagnosed with medical problems stemming from exposure to the defendant's herbicide. *Id.* at *1. He alleged that defendants' labeling was inadequate under Texas common law. *Id.* The court, applying an express preemption analysis after *Cipollone*, held that plaintiff's claims were not preempted and that FIFRA only preempts "state regulatory requirements." *Id.* at *3. In so holding, it specifically rejected the reasoning of *Arkansas-Platte II*, stating that the Tenth Circuit (1) failed to address the presumption against preemption, (2) disregarded *Cipollone*'s teaching that "there is no inherent conflict between federal preemption of state warning requirements and the continued validity of state common law damage actions", (3) failed to take into account the significant difference between the cigarette acts at issue in *Cipollone* (which mandated specific wording) and FIFRA (which does not), and (4) misconstrued FIFRA's express preemption provision. *MacDonald* at *3-*4.

As these cases make clear, further lower court review of the FIFRA preemption issue is only leading to *more* conflict, not, as Velsicol argues, "uniformity." This Court should resolve the growing conflict now.

3. *The Federal Question Presented Here is Extremely Important.*

Velsicol's third contention is that there is no need for review because what it calls "the most important issue" -- the principles governing preemption analysis -- was decided in *Cipollone* and there is no need for this Court "regularly to revisit *Cipollone* on a statute-by-statute basis". Opp. at 13. Even Velsicol concedes, however, that, in this case, the Nevada Supreme Court failed to follow the principles set forth in *Cipollone*. Opp. at 8 n.5, 14 n. 11. That is not because the Court below did not try. It said, "We do not find *Cipollone* instructive." Pet. App. 6a. Thus, the decision below and the other cases we have cited only confirm that *Cipollone* did not adequately resolve what Velsicol calls "the most important issue" and that the lower courts need further guidance. Pet. at 9-14.[2]

Equally important, Velsicol's attempt to minimize the need for statute-by-statute review in light of *Cipollone* plainly reflects *its* misreading of that case. If *Cipollone* makes anything clear, it is that determination of a statute's preemptive effect requires statute-specific analysis. Velsicol attempts to portray FIFRA's preemptive effect as a relatively unimportant issue, when, in fact, it is critically important -- to the State, the federal government, the Davidsons, the pesticide manufacturers, and pesticide poisoning victims throughout the nation.

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[2] *See also The Supreme Court -- Leading Cases*, 106 Harv. L. Rev. 163, 355-357 (1992), concluding that "two [FIFRA] preemption decisions in the wake of *Cipollone* indicate the need for clarification" and noting that "the [*Davidson*] court ignored *Cipollone*'s clearest directive ...[and]... misapplied *Cipollone*".

4. The Court Below Reached the Wrong Result.

Velsicol's final argument is that *certiorari* should be denied because, even though the Nevada Supreme Court violated the principles set forth in *Cipollone*, it nevertheless reached the right result. Opp. at 14. As we demonstrated in our petition, however, that simply is not so. Velsicol's argument that FIFRA expressly preempts plaintiffs' labeling claims is fatally flawed.

To begin with, Velsicol's extensive reliance on regulations promulgated by the EPA under FIFRA is misplaced. At bottom, the regulations show that the manufacturer is responsible for crafting the label and that the labeling regulations permit variations even among products containing the same active ingredients. *See, e.g., Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500, 1508 (W.D. Mo. 1991). Indeed, in this case, the EPA regulations permitted Velsicol to label its product inadequately and then change the label after the Davidsons were injured.

Moreover, Velsicol's suggestion, at 20, that EPA provides adequate oversight over the labeling process is absurd. An audit report released recently by the EPA's Office of the Inspector General concludes, among other things, that "EPA cannot provide the public with assurance that precautionary statements on many pesticide labels are adequate." *Labeling of Pesticides: Report of Audit No. E1EPF1-05-0429-2100613* (Sept. 30, 1992), at ii. It also finds that "[a]lmost half the pesticide labels evaluated had missing or inaccurate precautionary statements" and that "[o]ther pesticides were missing statements restricting usage of the pesticide to certified applicators." *Id.*

Velsicol's argument that FIFRA's § 136v(b) is the "functional equivalent of section 5(b) of the Public Health Cigarette Smoking Act" (the 1969 Act) at issue in *Cipollone*, Opp. at 16, is also unpersuasive. The two acts are functionally quite different. As the court noted in *Riden, supra* at 1588 (citation omitted):

> Unlike the cigarette act, which regulates only one product, FIFRA regulates 50,000 products -- the number of products registered under the Act. These pesticides represent 600 distinct active ingredients. To replicate the cigarette act's labeling scheme, the EPA would have to devise labels corresponding to each of the 600 active ingredients represented. Clearly, this would be an onerous task.

Velsicol also attempts to explain away the significance of the reference to "Such State" in § 136v(b), which refers back to a State that is "regulat[ing]" under § 136v(a), by arguing that "regulation" can be achieved as easily through common law damages as by positive enactments. Opp. at 16 n.12 As this Court made clear in *Cipollone*, however, that argument will not stand. "The term 'regulation' most naturally refers to positive state enactments." *Cipollone*, at 2619.

Similarly, contrary to Velsicol's contention, at 16, the holding in *Cipollone* did not rest solely on Congress's use of the word "requirement" in the 1969 Act. The *Cipollone* plurality viewed as determinative not the use of the word "requirement" (as opposed to the use of the words "statement" and "require" in the 1965 Act), but Congress's overall *expansion* of language from the 1965 Act to the 1969 Act and the fact that Congress had purposefully broadened

the scope of the Act's preemption provision during the legislative process. *Cipollone* at 2620-2621. Indeed, *Cipollone's* plurality opinion explicitly stated that, in another context, the presumption against preemption might "give good reason" to limit the 1969 Act's language only to positive enactments by state legislatures and agencies. *Id.*

FIFRA's legislative history, in contrast, reveals no evidence indicating that Congress intended to preempt common law damages actions. *See, e.g.*, Pet. at 19. Velsicol errs in relying on the words "to change federal labeling and packaging" in a House Committee Report to argue otherwise. The full sentence in the report reads as follows: "State authority to change federal labeling and packaging is completely preempted, and State authority *to further regulate* 'general use' pesticides is partially preempted." Opp. at 17 (emphasis added). Plainly, the words cited by Velsicol apply to regulations, not common law claims.

Finally, Velsicol fails to explain how plaintiffs' common law claims impose any requirements that are "in addition to or different from" what is required under FIFRA. *See* Pet. at 18. Velsicol's contention that state common law verdicts would defeat the "uniformity" intended by Congress for pesticide labeling is simply not true. Opp. at 18. In fact, if Velsicol to decided to change its label in response to an adverse verdict, it would just follow the same procedures that it followed in 1980, when it decided to modify the product label at issue in this case. Pet. at 3. Far from precluding such revisions, FIFRA requires such changes when they are necessary to adequately protect humans and the environment. Pet. at 18. The common law claims

"would neither add to nor differ from EPA's current requirements." *Riden, supra* at 1509.

CONCLUSION

This Court should grant the petition for a writ of *certiorari* or, in the alternative, summarily reverse the Nevada Supreme Court's holding of implied preemption in favor of its initial holding that there is no express preemption under FIFRA.

Respectfully submitted,

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